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November 10, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Competitive Bidding
PP Docket No. 93-253

Dear Mr. Caton:

Submitted herewith on behalf of Devsha Corporation is an original and four (4) copies of its Comments with respect to the above docket.

Kindly contact this office directly with any questions or comments concerning this submission.

Respectfully submitted,

William J. Franklin

William J. Franklin
Attorney for Devsha Corporation

Encs.
cc: Devsha Corp.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

COMMENTS OF DEVSHA CORPORATION

Devsha Corporation ("Devsha"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby files comments with respect to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/} These Comments discuss the issues raised in the NPRM as they affect Devsha and other small businesses and businesses owned by members of minority groups and women (defined in Paragraph 121 of the NPRM as "Designated Entities").^{2/}

FACTUAL BACKGROUND

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and
ensur[e] that new and innovative technologies are
readily accessible to the American people by avoiding

^{1/} 8 FCC Rcd ____ (FCC 93-455, released October 12, 1993) ("NPRM").

^{2/} See NPRM, ¶160 & nn.168-69. Because of the scope of the NPRM, the Comments cannot discuss every issue raised therein. Devsha's silence on other issues raised in the NPRM should not be taken to indicate any specific position thereon.

excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....^{3/}

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{4/}

Devsha is a start-up Delaware corporation, formed to provide newly emerging communications services. Devsha's sole shareholder is Mr. Darsh Aggarwal, a United States citizen of Indian (Asian-subcontinent) ethnic background. Mr. Aggarwal is a aerospace engineer with substantial communications background. He formerly owned and managed the cellular system for the North Carolina-9 Rural Service Area. As such, Devsha has special expertise to comment upon the NPRM from the perspective of the various Designated Entities.

COMMENTS

I. THE COMMISSION MUST DEFINE ELIGIBILITY OF "DESIGNATED ENTITIES" BROADLY, AND IN ACCORD WITH THE LEGISLATIVE INTENT.

Devsha supports the Commission's proposal (NPRM, ¶74) to base its system of preferences upon the existence of a "small business" or "rural telephone company", and not upon the gender

^{3/} Section 309(j)(3)(B); NPRM, ¶12.

^{4/} Section 309(j)(4)(D); NPRM, ¶13.

or minority status of the applicant. This scheme also avoids the difficult questions of ownership, control, or participation in consortia which use of a more complex eligibility test engenders.^{5/}

While further category-specific preferences might be desirable as an abstract proposition, the judicial baggage which such preferences carry could risk striking down the preferences in toto. In Devsha's experience, the Commission can reasonably presume that women-owned and minority-owned businesses are indeed small businesses, with minor exceptions (who, by definition) should be large enough to take care of themselves.

Devsha would support adoption of the existing definition contained in Section 309(i)(C)(ii) of the Communications Act, with the understanding that "Asian Americans" as defined therein includes those from the Indian subcontinent of Asia. Indeed, the Commission may presume that Congress intended to adopt this definition, based on the Budget Act's silence regarding any definition of the term or any specific authorization for the Commission to define the term by rule making.

Finally, Devsha supports the Commission's proposal (NPRM, ¶77 & n.51) to define small businesses using the criteria of the Small Business Administration. Use of an existing definition will add clarity to the qualification process for small businesses and facilitate the bidding process.

^{5/} See, e.g., NPRM, ¶¶77, 79.

II. THE COMMISSION CANNOT LAWFULLY REQUIRE SUBSTANTIAL UP-FRONT PAYMENTS FROM DESIGNATED ENTITIES AS A PREREQUISITE FOR COMPETITIVE BIDDING ELIGIBILITY.

The Commission's proposal that all bidders must make substantial up-front payments to be eligible to bid is inconsistent with its statutory obligations to favor Designated Entities. For example, under the Commission's proposals (NPRM, ¶103), a Designated Entity seeking to bid on a 20 MHz PCS license -- for which it could have a preference (NPRM, ¶121) -- would be required to make an \$8 million up-front payment to make a bid which, if successful, could be paid on the installment plan (NPRM, ¶122).^{5/} Lawfully, the Commission cannot require a Designated Entity to make more than a nominal up-front payment in order to become an eligible bidder.

More fundamentally, Devsha questions the Commission's statutory authority to require any up-front payments.^{2/} The Commission's justification (NPRM, ¶102) for such a payment appears in part to be premised on revenue maximization, a prohibited

^{5/} This proposal can only call to mind the oft-quoted maxim that "Both the rich and the poor have the opportunity to sleep under bridges."

^{2/} Devsha also opposes as draconian the Commission's proposal (NPRM, ¶109) to keep the 20% bid deposit if the highest bidder's application is later dismissed as defective. In many cases, a change in the applicable law or other intervening circumstances (some as trivial as an error in application preparation) can cause an application to be dismissed without applicant misconduct. Where misconduct occurs, the dismissal itself is a sufficient penalty. In egregious cases, the Commission can invoke its forfeiture authority against the violative applicant. Devsha, as is true with small businesses generally, simply cannot afford the automatic financial penalties which the Commission proposes.

concern. Further, the Commission's concern that the auction will terminate with the winning bidder unable to pay can be resolved by keeping the auction open until the granted license is final and unappealable.

III. THE COMMISSION SHOULD ADOPT A WIDE VARIETY OF PREFERENCES FOR DESIGNATED ENTITIES.

Consistent with the statutory requirements (quoted above), the Commission should adopt a wide variety of competitive bidding preferences for Designated Entities. These should include the following:

- The payment of auction deposits and winning bids by installments, amortized over the life of the granted license. (NPRM, ¶¶79, 121).
- Application of a "bid multiplier" for auction bids made by Designated Entities. See NPRM, ¶73, ¶80 & n.61. Devsha favors a 125% multiplier, i.e., a \$8,000 bid by Designated Entity would be equivalent to a \$10,000 bid by another company.
- Use of tax certificates, when a license is sold to a Designated Entity, when a Designated Entity sells its license in order to pay any deferred auction price, and when a Designated Entity sells a minority interest to a non-controlling investor. NPRM, ¶75, ¶79 & n.58, ¶80 & n.64, ¶121.

On the other hand, Devsha rejects the Commission's notion (NPRM, ¶121) that it may satisfy its statutory obligations to give a preference to Designated Entities by making two PCS frequency blocks into a Designated Entity "spectrum ghetto." Congress did not authorize the Commission to give preferences part of the time, especially where (as with PCS) the various frequency blocks have different technical and geographic constraints. Whatever

preferences are awarded to Designated Entities should apply to all auctionable licenses.

IV. THE COMMISSION SHOULD ELIMINATE THE REVIEW OF FINANCIAL REQUIREMENTS ON SPECIFIC APPLICATIONS SUBJECT TO COMPETITIVE BIDDING.

Devsha opposes the Commission's proposal (NPRM, ¶102) to pile its competitive bidding/payment requirements on top of existing financial qualification requirements. This cumulative showing of financial qualifications disadvantages Designated Entities, who have been historically constrained by difficulties in capital formation and financing.^{8/} Devsha respectfully suggests that the demonstration of financial qualifications in competitive bidding or by a documentary showing should be in the alternative.

Under this procedure, a Designed Entity filing an auctionable "long-form" application would not include any showing of financial qualifications as part of its initial application. If the application became mutually exclusive and subject to competitive bidding, the applicant's payment of its winning bid would unequivocally demonstrate that it was financially qualified.^{2/}

On the other hand, if the application did not become mutually exclusive (by virtue of a full settlement or an uncontested

^{8/} NPRM, ¶80, citing SBAC Report at i (Executive Summary).

^{2/} In Devsha's experience, the selling price of most Commission-licensed systems (cellular, SMR, PCP, common-carrier paging) far exceeds the purchase price of the tangible assets. Thus, if a Designated Entity can pay the auction bid, it can be presumed to be able to pay its initial construction and operating costs.

filing), then the applicant should have a short period, say 30 days, from the date of Public Notice (NPRM, ¶101 n.91) in which to file any required demonstration of financial qualifications by amendment.^{10/}

CONCLUSION

Accordingly, the Devsha Corporation respectfully requests that the Commission modify its proposed competitive bidding rules as set forth herein.

Respectfully Submitted,

DEVSHA CORPORATION

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^{10/} In this connection, the Commission should adopt the SBAC Report's recommendation that SBICs and SSBICs be treated as bona fide financial institutions for reasonable assurance purposes. See NPRM, ¶80 n.61. However, this treatment should also extend to "firm financial commitment" purposes as required by Section 22.917 of the Commission's Rules for cellular applicants, and as proposed (NPRM, ¶128) for PCS applicants.